United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7066

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

ROBERT ST. AMOUR,
Plaintiff - Appellee

JOSEPH STONE,
Intervening Plaintiff -
Appellee

P/S

v.

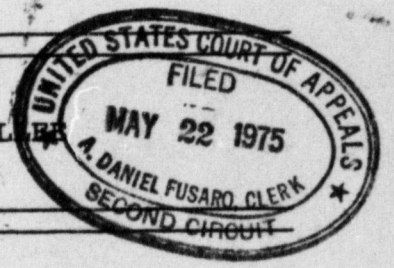
PAUL PHILBROOK,
Individually and as
Commissioner of the
Vermont Department
of Social Welfare,
Defendant - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF VERMONT

Civil Action No. 73-104

BRIEF OF INTERVENING PLAINTIFF - APPELLEE



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2

TABLE OF CONTENTS

TABLE OF CASES

PAGE

I. ISSUES PRESENTED

A. Does the Due Process Clause of the United States Constitution require notice and a hearing as prescribed in Goldberg v. Kelly, 397 U.S. 254 (1970), prior to the termination or suspension of welfare payments to on-going recipients of aid under Vermont's General Assistance program?

B. Did the district court judge err in failing to request the convening of a three-judge court to decide the Constitutional issue presented herein?

II. STATEMENT OF THE CASE

A. Proceedings Below

This civil rights class action was commenced on April 10, 1973, pursuant to 42 U.S.C. § 1983. Jurisdiction was grounded on 28 U.S.C. 1343(3). In his complaint the original plaintiff, Robert St. Amour, challenged defendant welfare commissioner's termination or suspension, without notice or prior hearing, of his General Assistance welfare benefits, on the ground that such action by defendant violated plaintiff's right to due process of law under the Fourteenth Amendment to the U.S. Constitution. Plaintiff St. Amour's request for temporary relief was heard on April 13, 1973, and the question of temporary relief was resolved in chambers without the issuance of a formal order.

On November 7, 1973, the complaint of intervening plaintiff Joseph Stone was filed, raising the same issues as the original complaint. On November 13, 1973, the district court granted Joseph Stone's motion to intervene and heard testimony and argument on the question of temporary relief. In an order filed December 4, 1973, the district court temporarily enjoined defendant Philbrook from continuing to withhold General Assistance maintenance benefits from plaintiff-intervenor without first affording him proper notice and opportunity for hearing.

Plaintiff Joseph Stone filed a motion for summary judgment on February 26, 1974. On March 4, 1974, the parties stipulated to the dismissal of the complaint of the original plaintiff, Robert St. Amour, and on March 8, 1974, defendant filed an answer to the complaint of plaintiff Joseph Stone. The hearing on plaintiff's motion for summary judgment was held May 2, 1974, with defendant filing a cross motion for summary judgment at that hearing.

On May 13, 1974, the district court ordered the parties to file a stipulation concerning certain facts deemed necessary by the court before the matter could be disposed of on the pending motions for summary judgment. The requested stipulation was filed on June 4, 1974, and, after hearing argument on defendant's motion to dismiss on grounds of mootness, Judge Albert W. Coffrin issued, on December 16, 1974, an opinion and order denying defendant's motion to dismiss, granting plaintiff's motion for class action

certification in part, and granting plaintiff's motion for summary judgment, with a declaration that the defendant's policy of denying evidentiary hearings prior to the termination or suspension of General Assistance is unconstitutional.

On January 14, 1975, defendant noticed his appeal to this Court. Shortly thereafter, he filed with the district court a motion for relief from judgment, on the ground that the case should have been heard and decided by a three-judge court. On February 18, 1975, after hearing, defendant's motion for relief from judgment was denied by Judge Coffrin.

B. Facts

Vermont's General Assistance program provides welfare assistance for the necessities of life to persons not eligible for any other kind of welfare payment. (Joint Appendix, p. 35.) Entitlement for benefits arises out of the state statute creating the program, 33 V.S.A. 3001 et seq. (The General Assistance statute is set out in full in the attached supplement to this brief.) In its most pertinent part, at 33 V.S.A. § 3003, the statute reads as follows:

> The (welfare) department shall furnish general assistance under this chapter to an eligible person at the expense of the state with due regard to the income resources and maintenance available to him. As far as funds are available and in accordance with section 3004 of this title, it shall provide a reasonable subsistence compatible with decency and health.

Section 3004 identifies the program as one for persons "in need and unable to provide a subsistence" for themselves and gives the commissioner of the welfare department certain specific authority to set standards.

Pursuant to his regulatory authority, defendant welfare commissioner has promulgated regulations setting out the eligibility standards and payment levels for the General Assistance program. (Appendix, pp. 80-89.) An eligible applicant may receive money for groceries and personal needs for from one to fourteen days (Appendix, p. 84), money for rent for up to one month (Appendix, p. 86), and money for fuel for a week or more and for utilities for a thirty day period. (Appendix, p. 88.) A person such as plaintiff Joseph Stone, who pays his rent by the week, must reapply for benefits on a weekly basis, since payment cannot be authorized until after the first day of the current rental period. (Appendix, p. 85.) Some applicants must reapply for food money on a weekly basis, while others need reapply only every two weeks. (Appendix, p. 84.)

Plaintiff Joseph Stone is a chronically unemployed person in his early fifties. His health is poor. (Appendix, p. 61 and p. 69.) From February through October, 1973, (with the exception of a five week period of hospitalization) he received weekly General Assistance checks from the welfare department for food, personal needs and rent. (See Judge Coffrin's opinion, Joint Appendix, pp. 69-70.) When Mr. Stone made his usual visit to

the welfare office on November 5, 1973, to pick up his food and rent money, his application was summarily denied on the ground that he had not satisfied the welfare department's work-seeking requirements. (Appendix, p. 49 and p. 70.) This interruption of plaintiff's weekly subsistence benefits occurred without notice or opportunity for a prior hearing. On November 7, 1973, plaintiff Stone filed his complaint herein, seeking relief against this allegedly illegal termination of his welfare benefits. (Appendix p. 10.)

As an on-going General Assistance recipient, plaintiff Stone is representative of the 20% to 25% of the General Assistance caseload which receives General Assistance three or more times per month. (Stipulation of parties, Appendix, pp. 58-59. Judge Coffrin's opinion, Appendix, p. 71.) For this portion of the caseload, General Assistance is "an on-going assistance program and not a one-shot, emergency relief program." (Report on the General Assistance Study, Appendix, p. 35.)

III. ARGUMENT

A. If Plaintiffs' Interest In The Uninterrupted Receipt Of General Assistance Benefits Is A "Protected Interest," The Procedural Requirements Prescribed In Goldberg v. Kelly Apply To Terminations Or Suspensions Of These Benefits.

It will help to narrow the focus of this discussion to first identify what is not in issue in this case -- the nature of the process which is "due" prior to termination or suspension once an en-

titlement to welfare benefits is established. Defendant concedes that the requirements prescribed in Goldberg v. Kelly, 397 U.S. 254 (1970), apply to terminations or suspensions of Vermont General Assistance benefits if there exists an entitlement to such benefits. (Brief of Defendant-Appellant, p. 31.) Thus, if there is an "entitlement' to General Assistance for certain recipients, as found by the district court, benefits under the program for those recipients cannot be terminated or suspended without 'timely and adequate notice detailing the reasons' for the action and a prior hearing where the recipient has "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." Goldberg, supra, at 267-268. Due process requires that the recipient have the option of being heard through counsel at such hearing, Id., at 270, and that the decision be based "solely on the legal rules and evidence adduced at the hearing." Id., at 271.

Defendant welfare commissioner contends, however, that there is no "entitlement" to continued receipt of General Assistance and that therefore there exists no right to the protections described in Goldberg. Our discussion, then, can be limited to the first step of the usual two-step due process analysis -- that is, to the question of whether plaintiffs' interest in the continuing receipt of General Assistance benefits is an interest in "property" or "liberty. Board of Regents v. Roth, 408 U.S. at 569, 570 (1972). If this question is answered in the affirmative, it is clear that the procedural protections outlined in Goldberg, supra, apply.

B. The First Step In Traditional Due Process Analysis Requires A Liberal Approach.

The determination of whether a given interest constitutes a property interest or an interest in liberty protected by the Due Process Clause requires a broad and liberal construction of the terms "property" and "liberty." Roth, supra, at 571. These are

> broad and majestic terms. They are among the "(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience . . . . (T)hey relate to the whole domain of social and economic fact . . . ."

Id. Once a protected interest is identified, the degree of protection it deserves is determined through a balancing of the private and governmental interests involved. Goldberg, supra, 397 U.S. at 264-265. In some situations, the government interest involved will be deemed to be so strong as to allow summary deprivation of property, pending a later hearing. (See cases collected in Goldberg, supra, 397 U.S. at 265, n.10.) In others, such as the welfare context, the weight of the private interest has been held to override the government interests involved, Goldberg, supra at 266, making a prior hearing mandatory.

In any event, it is at the second stage of due process analysis that the careful weighing process takes place. [Thus, the administrative problems in implementation of a prior hearing policy in the General Assistance context, (Brief of Defendant-Appellant, pp. 39, 40) are not relevant to the issue before this Court.] At the first stage of analysis, in determining whether an

interest deserves due process protection of some kind, the courts have properly adopted a liberal approach. Thus, the relatives of servicemen missing in action were held to have a property interest, regardless of need, in the continuation of the entitlement granted to them by statutes providing for payments to families of MIA's. McDonald v. Lucas, 371 F. Supp. 831 (S.D.N.Y., 1974). And the interest of a prisoner in "prospective parole" has been held to be a protected interest, U.S. ex rel Johnson v. Chairman, N.Y. State Board of Parole, 500 F.2d 925 (2d Cir., 1974), as well as the right to continued occupancy in quasi-public housing even after expiration of a lease. Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir., 1974).

The point is, the first hurdle of due process analysis is not particularly high. Many interests, both in property and liberty, of a less substantial nature than plaintiffs' General Assistance entitlement have been found to warrant due process protection. That a recipient's interest in continued receipt of General Assistance benefits warrants such protection is, as will be shown below, beyond cavil, since eligibility for such benefits is "grounded in statute." Roth, supra, 408 U.S. at 577.

C. Plaintiffs' Statutory Entitlement To Receipt of General Assistance Constitutes Both A Property Interest And An Interest In Liberty Protected By The Due Process Clause Of The Fourteenth Amendment.

1. Property Interest

> (T)he Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process.

Thus sayeth Mr. Justice Stewart in Board of Regents v. Roth, 408 U.S at 576 (1972), by way of explanation of the Court's decision in Goldberg, supra. Goldberg held further that the right to benefits under certain statutorily created welfare programs administered by the State of New York could not be terminated without a prior hearing. Joseph Stone's entitlement to General Assistance is created by the Vermont statute which requires the welfare department to pay General Assistance to eligible applicants. (33 V.S.A. 3003, reproduced in full in the supplement hereto at S-3.)

Defendant welfare commissioner contends that Goldberg does not apply to Vermont's General Assistance program because even chronic recipients such as plaintiff Joseph Stone are required to have their eligibility redetermined on a weekly basis. (Brief of Defendant-Appellant, p. 31.) But Goldberg does not speak in terms of the frequency of eligibility redetermination under a welfare program. Rather, the crucial consideration for due process purposes is the existence of state law, regulations or understandings which support claims of entitlement to benefits.

> Thus, the welfare recipients in Goldberg v. Kelly, supra, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Roth, supra, at 577. When an eligibility redetermination is made in the case of a current, or on-going, recipient of assistance, the recipient is entitled to a hearing on an adverse determination prior to termination of benefits. Goldberg, supra, 397 U.S. at 264.

Judge Coffrin found, pursuant to the stipulation of the parties hereto, that from 20% to 25% of the General Assistance population could be classified as on-going recipients. (Appendix, p. 76.) The defendant's own study of the General Assistance program, which is part of the record herein pursuant to plaintiff's request to admit, bears out the existence of this large on-going General Assistance caseload. (Appendix, pp. 21, 25, 27, 32, 33, 34, 35, 37, 39, 45.) Defendant claims that benefits are not "terminated" when the weekly grant is denied to one of these on-going recipients, but any other characterization ignores the plain meaning of the word "terminate."

The line of cases dealing with the right to due process in the context of termination of unemployment compensation benefits confirms that for these on-going General Assistance recipients, the mere fact of weekly redeterminations of eligibility cannot be said to foreclose the existence of an interest in benefits safeguarded by the Due Process Clause.[1/] While these unem-

1/Crow v. California Dept. of Human Resources, 325 F. Supp. 1314 (1970), rev'd on other grounds, 490 F.2d 580 (1973), vacated and remanded to consider mootness and need for three-judge court, 43 U.S.L.W. 3451 (Feb. 14, 1975); Wheeler v. State of Vermont, 335 F. Supp. 856 (D. Vt. 1971); Pregent v. New Hampshire Dept. of Employment Security, 361 F. Supp. 782 (D. N.H., 1973) vacated and remanded to consider mootness, ____ U.S. _____, 41 L.Ed.2d 207 (1974); Steinberg v. Fusari, 364 F. Supp. 922 (1973), vacated and remanded for reconsideration in light of changes in state law 43 U.S.L.W. 4121 (January 14, 1975); Torres v. New York State Department of Labor, 321 F. Supp. 432 (S.D.N.Y., 1971), vacated and remanded 402 U.S. 968 (1971), 333 F. Supp. 341 (S.D.N.Y., 1971), aff'd. 405 U.S. 949 (1972), reh. den. 410 U.S. 971 (1973).

ployment compensation cases have met various fates on appeal unrelated to the narrow issue at hand, they all recognize at least implicitly that a protected property interest exists in continued receipt of unemployment compensation benefits notwithstanding the fact that eligibility is redetermined every week. Crow, at 325 F. Supp. 1319, and Wheeler, at 361 F. Supp. 793, 794, discuss the weekly application question explicitly and reject the contention that the fact of weekly redeterminations of eligibility forecloses the existence of a protected interest. Even in Torres, supra, where the three-judge court rejected the plaintiffs' due process claim on its merits and the Supreme Court affirmed, the rejection was based on the fact that adequate due process protections had been afforded to the plaintiffs, indicating strongly that there must have been, in the court's view, some interest to protect. The reasoning of these cases applies equally well to the General Assistance program. As the lower court 2/ stated in Crow, supra, at 1319:

> Welfare and unemployment compensation schemes both involve an initial decision re general eligibility, followed by periodic determinations that the applicant's circumstances have not changed in such a way as to affect that first decision. It is difficult to say at any point in the proceeding whether the recipient's right to further payments is "vested" or not, and the Court in Goldberg made no such distinction. (footnote omitted.)

2/In Crow, the court of appeals reversed the district court's holding that the procedures followed by the California Department of Human Resources in the termination or suspension of unemployment compensation benefits were constitutionally deficient, but, as discussed above, implicit in this reversal is the finding that some form of due process was required and therefore that a protected interest in the continuation of benefits did exist.

Defendant relies on Arnett v. Kennedy, _____U.S._____, 40 L.Ed.2d 15 (1974), a federal employee termination case, for the proposition that, even if plaintiffs herein are found to have a protected interest in continued receipt of General Assistance, the procedural rules established by the General Assistance statutes and regulations control as to what procedures are necessary before benefits can be terminated, and those rules allow for post-termination, but not pre-termination, hearings. (Brief of Defendant-Appellant, pp. 37-39.) This proposition fails on two grounds.

First, six members of the Arnett Court specifically rejected the plurality view that, when a right is created by statute and the same statute attaches procedural limitations to that right, then the procedural limitations of the statute, as opposed to those prescribed by the Constitution, apply. Arnett, supra, concurring opinion of Mr. Justice Powell, _____U.S. at _____, 40 L.Ed.2d at 40. In his dissenting opinion in Arnett, _____U.S. _____, 40 L.Ed.2d a6 66, Mr. Justice Marshall rejected the above plurality view, by saying that

> (i)t would amount to nothing less than a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process. (footnote omitted)

Second, the General Assistance statute (supplement hereto, pp. S-1 to S-6) does not refer to hearings at all, and the relevant general welfare department regulation in fact provides for a pre-termination hearing upon a "proposed termination

or reduction of aid or benefits' if a timely request is filed and issues of fact or judgment are involved. (Joint Appendix, p. 90.) Hearings are not addressed in the specific regulations dealing with General Assistance (Joint Appendix, pp. 79-89), and the bald assertion in the regulations that General Assistance "has no provision for on-going assistance" (Appendix, p. 79) simply is contrary to the facts as found by the district court, and thus is not relevant to the question of hearings for on-going recipients. The specific regulations governing eligibility for General Assistance still allow an eligible recipient to receive aid week in and week out, so long as he continues to meet the stated eligibility criteria (Appendix, p. 80.) Thus, even if the plurality view in Arnett, supra, were good law, it would not be applicable here because the General Assistance laws and regulations do not restrict the right to a hearing prior to termination of benefits.

2. Plaintiffs' Interest in Liberty

The Due Process Clause protects both property and liberty. Roth, supra, at 569. While the property interest aspect of welfare entitlements got most of the Court's attention in Goldberg, the Court also recognized, at least implicitly, that a person's interest in liberty may also be affected by arbitrary termination of welfare benefits. Thus the Goldberg Court stated, at 397 U.S. 265, that

> (W)elfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities

> that are available to others to participate meaningfully in the life of the community.

Liberty, as protected by the Due Process Clause, is an extremely broad concept. Roth, supra, at 572. As long ago as 1923, the Supreme Court recognized that the concept of liberty included the right to engage in many of the activities which constitute meaningful participation in the life of the community. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). These activities include the right to contract, to work, to acquire knowledge, to marry, to raise children, to worship "and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." Id.

If, as the Goldberg Court found, subsistence welfare grants such as General Assistance allow some degree of meaningful participation by recipients in the life of their community, then arbitrary termination of such grants constitutes deprivation of an interest in liberty, as defined in Meyer, supra, in violation of the Due Process Clause of the Fourteenth Amendment. This Court, albeit in a different context,[3/] has recognized that disputes over welfare entitlements involve not only property rights, "but some sort of right to exist in society . . . ." Johnson v. Harder,

3/The discussion in Johnson, supra, involved the now obsolete distinction between property rights and personal rights for purposes of jurisdiction of 42 U.S.C. 1983 claims brought under 28 U.S.C. 1343(3). See, Lynch v. Household Finance Corporation 405 U.S. 538 (1972).

438 F.2d 7, 11 (2d Cir., 1971). Nothing could be more basic to liberty than that right. It is what General Assistance provides, and as such continued receipt of benefits is an interest in liberty protected by the Due Process Clause.

D. The "Common Law" Of General Assistance Allows For Continuing Benefits, Thus Creating An Entitlement To Those Benefits Which Is Protected By The Due Process Clause.

Plaintiffs believe that the foregoing analysis based on a statutory entitlement to General Assistance benefits is the proper analysis for this case. The district court, however, feeling that weekly redeterminations of eligibility precluded a straightforward entitlement approach (Opinion, at Appendix, p. 74.), relied on a finding that the de facto continuation of benefits which many General Assistance recipients enjoy creates a protected interest which is safeguarded by the Due Process Clause. (Appendix, p. 75.) While plaintiffs do not agree that the mere fact of weekly eligibility determinations forecloses the existence of a statutory entitlement to benefits (see p. 10, supra), it is clear that even if one assumes that there is no statutory entitlement, the district court was correct in finding the existence of a protected interest pursuant to the reasoning of Perry v. Sindermann, 408 U.S. 593 (1972).

In Sindermann, the Court held that a teacher who relied on nine consecutive annual teaching contracts as a type of tenure

might be entitled to a hearing upon non-renewal if it could be shown that the practice of the school was to grant effective tenure, albeit in an informal way, by successive renewals. Sindermann was decided the same day as Board of Regents v. Roth, 408 U.S. 564 (1972). In Roth, the Court rejected the contention of a non-tenured teacher that he was entitled to a hearing upon being told that he would not be rehired for a second year. Roth's one year contract made no provision for renewal whatsoever, nor were there any rules or understandings which could be said to give him a right to renewal absent sufficient cause. Thus the Court found that he had no protected property interest in renewal. In Sindermann, on the other hand, the teacher had alleged the existence of rules or understandings issued or fostered by school officials, which had created a "common law" tenure system. The Court held that if these allegations could be proved, the teacher's interest in renewal of his contract would have the status of a protected interest for due process purposes. Sindermann, supra, at 602-603. See, Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir., 1974), citing with approval Joy v. Daniels, 479 F.2d 1236 (4th Cir.,1973) (there is a "common law" of tenancy in public housing which gives tenants a protected interest in continuation of such tenancy even after the expiration of a written lease.)

It is clear that for the 20% to 25% of the General Assistance population which the district court found to be on-

going recipients, there is a common law rule of continuation of General Assistance benefits. Even if this Court finds that the statutes and regulations governing General Assistance do not create a straightforward entitlement for due process purposes, they do create a right to renewal of eligibility absent sufficient cause for termination. That is, as long as a recipient continues to meet the statutory and regulatory definitions of eligibility, he can be assured of receiving a General Assistance check each week. There is no limit on the number of successive applications.[4/] The absence of any such provision or understanding for renewal "absent sufficient cause" was the crucial factor in the Court's decision that the plaintiff in Roth, supra, had no property interest in re-employment. Roth, supra, at 578. The system of continuation absent sufficient cause for termination in the General Assistance program, if not indicative of an outright entitlement, at least indicates the existence of a common law of continuation of benefits similar to the common law of tenure which the court found might exist in Sindermann, supra.

A further indication of the existence of a common law of continuation of General Assistance benefits is found in the study of the General Assistance program which is part of the record in this case. One of the findings of that study is that a finding of ineligibility is much more likely to occur on initial

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4/It is difficult, of course, to provide a definitive citation of authority to prove the existence of a negative. Careful examination of the statutes (S-1 to S-6 hereto) and regulations, (Appendix pp. 79-90) however, reveals no limit on the continued receipt of General Assistance benefits other than continuing to meet the prescribed eligibility criteria. That is, absent sufficient cause for termination, benefits will continue.

application than on a subsequent visit to the welfare office. That is, in the words of the study, "(t)he initial hurdle of eligibility determination is not easily overcome, but . . . once a client's eligibility has been determined, he is progressively assimilated into an ongoing caseload." (Appendix, p. 39.)

In sum, the rules, understandings and practices surrounding the General Assistance program have created a situation in which the interest of certain on-going recipients in continuation of benefits under the program has attained the status of an interest in property safeguarded by the due process protections outlined in Goldberg.

E. The Single District Court Judge Was Correct In Not Requesting That A Three-Judge Court Be Convened To Hear This Case.

After Judge Coffrin handed down his opinion herein, defendant-appellant filed a motion for relief from judgment in which he requested the district court to vacate its judgment on the ground that it lacked subject matter jurisdiction inasmuch as a three-judge court should have been convened to hear the case. After hearing, Judge Coffrin denied the motion without opinion and defendant has raised the issue again on this appeal.

Any hope of reaching a reasoned conclusion as to whether or not a three-judge court should have been convened in this case depends upon a close examination of the allegations of plaintiffs' complaint, Nieves v. Oswald, 477 F.2d 1109 (2d Cir., 1973), and of the statutes and regulations involved. In his complaint, (Appendix, pp. 4-12) plaintiff Joseph Stone sought an injunction

against the termination, interruption or suspension of his General Assistance grant through defendant's allegedly illegal administration of the General Assistance program. Plaintiff also sought declaratory relief. No statute or regulation was attacked in the complaint as constitutionally invalid. Rather, plaintiffs' Statement of Claim (Appendix, pp. 7-8) challenges defendant's characterization of the interruption of General Assistance as something other than a termination subject to the due process requirements of Goldberg v. Kelly, supra.

The General Assistance statute (see supplement hereto) makes no reference to hearings or to procedures to be followed when an application is denied or assistance terminated. To the extent that they deal with the subject, the regulations involved here indicate a general policy of making a hearing available prior to any proposed termination or reduction of assistance. (Appendix, p. 90.) The regulations, as amended while this case was under submission to the district court, also contain a statement that General Assistance "has no provision for on-going assistance." (Appendix, p. 79.) This bald assertion is the defendant's apparent attempt to regulate away the finding of the district court that for a portion of its recipients the General Assistance program constitutes an on-going welfare program. Whatever the purpose of this statement in the regulations, it is irrelevant to the three-judge court controversy, since plaintiffs do not challenge its constitutionality, only its accuracy, and the erroneous administrative action spawned

by defendant's misconception of the nature of the General Assistance program.

The three-judge court statute (28 U.S.C. § 2281, set out in full at p.8 of defendant-appellant's brief) requires convocation of a tribunal when an action challenges a state statute or regulation as unconstitutional on its face or as applied, but not when the challenge is merely to erroneous administrative action under an admittedly constitutional statute or regulation. Ex Parte Bransford 310 U.S. 354, 361 (1940). Put another way by Judge Friendly, citing Bransford,

> (a) three-judge court is not mandated "where the challenge was not to the statute authorizing the officer to act, but to his particular exercise of his statutory powers."

Galvan v. Levine, 490 F.2d 1255, 1258 (2d Cir. 1973), cert. den. 417 U.S. 936 (1974). In Galvan, the complaint as it reached this Court was narrowed to a claim of discriminatory application of a certain New York unemployment compensation regulation. The plaintiffs had sought injunctive relief, but, relying on the above-quoted distinction between an attack on a statute and an attack on an administrator's exercise of statutory powers, this Court found that a three-judge court was not required. Defendant would distinguish Galvan, supra, from the present case by pointing to the Court's finding in Galvan that the challenged discriminatory use of the regulation was "at several removes" from the statute and from the general policy articulated in the regulation, Id., at 1259, thus eliminating the possibility that enjoining the discrimination would

frustrate some legislative or administrative policy. While its use is admittedly a "treacherously subtle" process, Id., at 1258, the "erroneous administrative action" test is actually more, not less, applicable to the present case than it was to Galvan, supra, since here there is absolutely no statutory basis for the challenged action and the general regulatory policy would seem to support plaintiffs' claim that defendant is acting erroneously when he terminates General Assistance benefits without a prior hearing. Cf., Johnson v. Harder, 438 F.2d 7 (2d Cir., 1971) (Challenge to administration of an otherwise constitutional welfare regulation in an unconstitutional manner held not to require convening of three-judge court.)

Another application of the principle that a constitutional attack on erroneous administrative action does not require the convening of a three-judge court is found in the tenth circuit case of Doe v. Rose, 499 F.2d 1112 (1974), where it was held that a three-judge court need not be convened to decide what was found to be a substantial constitutional challenge to the "informal policy" of the Utah welfare department of refusing to pay for abortions under medicaid unless approved as being "therapeutic" in nature. The policy was not required by state statute and in fact may have been in conflict with pertinent federal law (just as defendant's policy here is in conflict with the general regulatory policy of granting hearings prior to welfare terminations), and the Court of Appeals for the Tenth Circuit held that on these facts plain-

tiffs' challenge was to erroneous administrative action and did not require the convening of a three-judge court. Id., at 1114 fn.2. See also Donahue v. Staunton, 471 F.2d 475 (7th Cir., 1972); and Benoit v. Gardner, 351 F.2d 846 (1st Cir., 1965).

Defendant's reliance on Sands v. Wainwright, 491 F.2d 417 (5th Cir., 1973) is misplaced, since there a favorable disposition of plaintiffs' constitutional claims would have required revamping of the regulations in question. The basic result of affirmance of the district court's order in this case, on the other hand, would be to require defendant to adhere to the already existing general policy of granting hearings to welfare recipients prior to termination or suspension of their benefits.

F. Even If A Three-Judge Court Was Initially Appropriate Herein, The Present Posture Of The Case Makes Reversal On That Ground Inappropriate.

Assuming, for argument purposes only, that a three-judge court should have been convened when this action was filed, it is clear from the present posture of the case -- with declaratory relief being the only relief granted -- that a three-judge court was not really necessary and that any error with respect to the failure to convene a three-judge court was harmless error and is not now grounds for reversal.

Thus in Astro Cinema Corp., Inc. v. Mackell, 422 F.2d 293 (2d Cir., 1970), this Court found that substantial questions had been raised by the complaint as to the constitutional validity of

the statute in question and so a three-judge court should have been convened. The Court refused to reverse on that ground, however, saying that to do so at that point in the litigation would be "futile," since it would only lead to a decision on the merits by three judges (two district judges and one appellate judge) other than the three appellate judges before whom the case was then pending. Id., at 298. In his opinion in Astro, supra, Judge Kaufman noted that there must be a demand for an injunction to bring § 2281 into play, and that in fact there had been such a demand in the case before him, combined with a demand for return of the film which had allegedly been illegally seized. By way of support for the Court's refusal to reverse on the grounds that a three-judge court should have been convened, Judge Kaufman noted that:

> While we have directed the film to be returned . . . the injunction, the substance of requirement for application of § 2281, has not been granted;

Id., at 298. In the instant case, injunctive relief was requested, but was not granted. Receiving the case in its present posture, then, this Court should not reverse for the harmless error of failure to convene a three-judge court, but rather should adopt the practical approach used in Astro, supra, and either affirm or reverse on the merits.

Similarly, in Dale v. Hahn, 440 F.2d 633 (2d Cir., 1971), Judge Waterman noted that while this Court was not passing on the question of whether injunctive relief was appropriate at the

commencement of the action, it did not hesitate to rule, in the interests of judicial economy, that such relief was not necessary at the time of this court's decision and therefore "now a three-judge district court is not needed in this case." Dale supra, at 640. Dale is thus further support for the proposition that the Court of Appeals should consider the posture of the case when it reaches this Court as a factor in ruling on three-judge court questions. As the instant case, in its present posture, does not involve any injunctive relief, no three-judge court is now necessary, even if it may have been necessary at some earlier stage of the proceedings.

While defendant herein may be correct in stating that lack of subject matter jurisdiction can be raised at any point in the proceedings, Astro and Dale, supra, indicate that when such an assertion is based on the failure to convene a three-judge court, the case will be viewed as it stands at the time the jurisdictional question is raised. See also, Abele v. Markle, 452 F.2d 1121, 1126 (2d Cir., 1971).

Thoms v. Heffernan, 473 F.2d 478 (2d Cir., 1973), vac. and remanded on other grounds, 41 L.Ed.2d 1154 (1974), is also instructive with respect to the proper treatment of the three-judge court issue when injunctive relief is sought initially but the final district court order provides declaratory relief only. Thoms, supra, dealt with the question of the proper locus for an appeal from a decision of a three-judge court which granted declaratory relief only, though an injunction had been sought. 28 U.S.C. 1253

provides for direct appeal to the Supreme Court of an order "granting or denying" an injunction in a suit required to be heard by a three-judge court. In ruling that the appeal was properly before it, this Court held that the district court's "forbearance" was neither a granting nor denial of an injunction which would require direct appeal to the Supreme Court. Rather, such forbearance from the issuance of an injunction was viewed as reasonable for reasons of comity and the belief that state officials would obey the law as declared. The Thoms court, at 473 F.2d 481, stated that:

> (i)n the present state of the case no one knows if an injunction will ever be required, let alone against whom such an injunction might run. In such circumstances appeal lies directly to us as if only a declaratory judgment and not an injunction were sought in the first instance. (emphasis supplied)

The analogy between the direct appeal provision and the provision dealing with the convening of a three-judge panel when a case is commenced is obviously not perfect. The lesson of Thoms, as well as Astro and Dale, supra, is clear however: when considering issues involving the three-judge court statutes, the posture of the case at the time the three-judge court issue is being considered is a relevant consideration for purposes of a decision on that issue. In its present posture, the instant case involves no injunctive relief and so, even if defendant's assertion that a three-judge court should have been convened at the outset of these proceedings is correct, no such panel is now required and the case should proceed as if only declaratory relief had been sought. The case of Nieves v. Oswald,

477 F.2d 1109 (1973), relied on by defendant, is not to the contrary, since the district court decree therein contained some final injunctive relief.

IV. CONCLUSION

In light of the foregoing arguments, it is respectfully requested that this court affirm the decision of the district court in this case.

Dated: May 20, 1975

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CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of May, 1975, a copy of this brief was mailed postage prepaid to Dean B. Pineles, Esquire, Assistant Attorney General, Office of Attorney General, State Office Building, Montpelier, Vermont 05602, attorney for defendant-appellant.

Dated: May 20 1975

S. W. Kimbell

Stephen W. Kimbell

SUPPLEMENT TO APPELLEE'S BRIEF

Vermont's General Assistance Statute

(33 V.S.A. 3001 et seq.)

CHAPTER 38. GENERAL ASSISTANCE

SUBCHAPTER 1. GENERAL PROVISIONS

SUBCHAPTER 2. RELIEF

SUBCHAPTER 3. EMPLOYMENT

SUBCHAPTER 4. RECOVERY FOR GENERAL ASSISTANCE FURNISHED

3075. Action for recovery of expenditures.

Subchapter 1. General Provisions

§ 3001. Definitions

Unless otherwise expressly provided the words and phrases in this chapter mean:

(1) "District welfare director" means an employee of the department so designated by the commissioner.

(2) "Family" means persons whom the recipient of general assistance is required by law to support.

(3) "Found" means discovered, come upon, chanced upon, met with by accident.

(4) "General assistance" means financial aid to provide the necessities of life including food, clothing, shelter, fuel, electricity, medical care and other items as the commissioner may prescribe by regulation when a need is found to exist and the applicant is otherwise found eligible.

(5) "House" means a structure wherein people live, including a hospital.

(6) "Offense" means any act that gives rise to a cause of action whereby the offender is committed to jail, excluding criminal acts.

(7) "Relief or relieving" means general assistance limited to medical assistance and other assistance required in connection therewith, but excluding financial assistance.

(8) "Reside" means having a domicile.

(10) "Transient" means an individual who does not intend to establish a permanent residence within the state of Vermont.

§ 3002. Town service officer, appointment, duties, compensation

(a) On or before April 15 of each year the selectmen shall appoint a town service officer and notify the commissioner of their appointment. A town service officer may be appointed to serve simultaneously more than one town. A selectman may be a town service officer. The commissioner shall give him a certificate of appointment and contract for his compensation. If the selectmen fail to appoint a town service officer the commissioner may do so. In the absence of the town service officer any selectman may act in his behalf. Successors of a retired, dismissed, deceased, or removed town service officer shall be immediately appointed by the selectmen of the town under the same procedures as the original appointment.

(b) The duties of town service officers are to receive applications for assistance, to investigate, make determinations of eligibility for general assistance, grant from funds advanced to him for emergency general assistance and to perform other duties, including such investigations, under the welfare code as the commissioner may direct.

§ 3003. General assistance at the expense of the state

The department shall furnish general assistance under this chapter to an eligible person at the expense of the state with due regard to the income resources and maintenance available to him. As far as funds are available and in accordance with section 3004 of this title, it shall provide a reasonable subsistence compatible with decency and health.

§ 3004. Eligibility

(a) Unless disqualified under other provisions of the welfare code, a person is eligible for general assistance if he is in need and unable to provide a subsistence for himself or is unable to secure a subsistence from a person legally responsible for his support and is otherwise found eligible. The commissioner shall establish criteria which recognizes the highest levels of need and eligibility in the following classes of applicants:

(1) Individuals under the age of majority;

(2) Aged, blind or disabled persons with emergency needs;

(3) Individuals who are supporting one or more dependents.

Accordingly, different criteria for need and eligibility and different levels and periods of payment may be established for other classes of applicants.

(b) The department of social welfare, consistent with available appropriations, shall furnish general assistance under this chapter to any otherwise eligible person unable to provide thenecessities of life for himself and for those whom he is legally obligated to support, with due regard to income and resources available to him during the 30 days immediately preceding the date on which assistance is sought or such shorter period as the commissioner may prescribe by regulation.

(c) Eligibility standards for general assistance as established by the commissioner need not be the same as those applicable to the department's categorical assistance programs. In addition, in determining eligibility, the commissioner, pursuant to regulation, may take into account payment to or for the benefit of the applicant under any department program.

(d) It is further provided that in determining eligibility apart from the need standard, the commissioner may promulgate a reasonable standard pertaining to work-related efforts on the part of the applicant.

(c) Except for relief as provided in subchapter 2 of this chapter, general assistance to transients shall be limited to that necessary to permit the transient to leave the state.

§ 3005. Application or information

(a) A person may apply for general assistance to the nearest available town service officer or district welfare director in the manner required by the commissioner.

(b) When a town service officer or district welfare director receives an application for general assistance or is informed that a person is in need of general assistance, he shall investigate and make a determination as to the applicant's eligibility for general assistance, and provide under regulations of the department emergency assistance as may be required. The town service officer shall promptly notify the district welfare director of all determinations which he makes as to an applicant's eligibility.

§ 3006. Action on application or information

The commissioner shall cause an investigation and record to be made of the circumstances of the person alleged to need general assistance to determine whether the person is eligible. Information shall be sought as to the residence of the person, his age, physical condition, earnings or other income, ability to be gainfully employed of all members of his family, the cause of the person's condition, the ability and willingness of persons legally liable for his support to assist, and other relevant facts.

§ 3007. Limitation on liability for medical assistance

The state shall not be liable for medical or surgical care furnished to any person eligible for general assistance, unless the department agrees to it. However, without agreement recovery may be had from the department for necessary emergency care until it is first reasonably possible to contact a welfare officer or town service officer. This section shall not apply to hospitals.

§ 3008. Disqualification

(a) When the town service officer or district welfare director or the commissioner has reason to believe that an applicant for or recipient of general assistance came into the state for the purpose of receiving general assistance they may find the applicant or recipient ineligible for general assistance.

(b) Notwithstanding the provisions of subsection (a), an applicant in immediate need of general assistance for himself or a person dependent upon him shall be granted general assistance on an emergency basis, which may include the furnishing of transportation to the nearest boundary of this state in the direction in which he desires to go to leave the state.

Subchapter 2. Relief

§ 3025. Relief by private persons and hospitals

(a) Except as provided in subsection (c), when a person, including a transient, is injured, suddenly taken sick or lame, or is otherwise disabled and confined to a house or hospital in this state, and is in need of relief, the person at whose house or hospital he is shall be at the expense of relieving and supporting the person, until notice in writing of the situation of the person is given to the department, after which the department shall provide for the relief and support of the person.

(b) Except as provided in subsection (c), in the case of a hospital the notice required in subsection (a) shall be supplemented, as soon as reasonably possible, with a plan or proposed method of collecting from the person for relief and care, and other pertinent information requested by the department. In the case of a person, after giving notice required in subsection (a), he shall file additional information with the department on a form prescribed by the commissioner.

(c) The commissioner may provide by regulation for an exemption from the notice and report requirements of subsections (a) and (b) in the case of a hospital which makes and observes satisfactory arrangements considered adequate by the commissioner. When so exempted, the provisions of the last sentence of section 3027 of this chapter shall not apply.

§ 3027. Reimbursement for relief expenditures

If the department fails to provide relief for a person including a transient, the person or hospital relieving him may recover therefor in an action on this statute against the state of Vermont. However, no recovery may be had for any period in excess of seventy-two hours before notice is given to the department if the plaintiff has failed to timely file the information required under subsection (b) of section 3025 of this title.

§ 3028. Death

When a person, including a transient, dies in the state in other than a state institution and no one appears to make

funeral arrangements, the person in charge thereof shall report the death of the person to the nearest welfare officer or town service officer.

§ 3029. Persons outside house, hospital or jail

When a person needing relief, including a transient, is found in a place other than a house, hospital or jail, the town service officer may provide relief under regulations of the commissioner.

Subchapter 3. Employment

§ 3050. Duty of department

The department shall help employable person receiving general assistance to find employment and may carry on programs to employ them in productive work or services. The department shall take all reasonable means to correct any propensity towards idleness on the part of any recipient of general assistance who is able to work.

§ 3051. Training

A person receiving general assistance may apply to the commissioner for aid in obtaining occupational training for the purpose of becoming self-supporting, or increasing his earning capacity. The commissioner may provide for the training of a person who satisfies the commissioner that he has the aptitude, ability, talent and will to benefit from the course of training. Aid may include all costs of the training, including but not limited to tuition, books and supplies.

Subchapter 4. Recovery for General Assistance Furnished

§ 3075. Action for recovery of expenditures

Whenever a person, who has received general assistance from the department, owns or thereafter acquires real or personal property or an interest therein or becomes employed, the department on behalf of the state of Vermont may recover on this statute against him the amount the department has expended for general assistance furnished him or his family. If the person is deceased, the amount expended by the department shall be allowed as a claim against his estate as a debt due the state. All statutory exemptions shall apply in the civil action. Statutes of limitations shall not be a defense or bar a debt due the state.